Supreme Court, U.S.
FILED

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NO. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1996

Richard Gabel
Petitioner

vs.

Kerry Medeiros Commissioner
of Internal Revenue Service
Respondent.

PETITION FOR A WRIT OF CERTIORARI & MANDATE FOR THE RETURN OF PROPERTY TAKEN WITHOUT NOTICE

Richard Gabel
4725 Rolling Hills Way
Castro Valley, California PZ 94546
(510) 581-3591

Richard Gabel Date 1 Jan 1997

42 pp

QUESTIONS PRESENTED FOR REVIEW

Issues presented for review are as follows:

1. Did Kerry Medeiros, violating both Federal and States Constitutions, and the 5th, Due-process clause (rights of Notice and Opportunity), by the taking of a third parties property without Notice.?

2. Should we sustain and condone Government agents telling falsehoods, lies, and perjuring them selves for the sake of taking a third party's property to pay the tax of another ?

3. Does 26 U.S.C. 7426. Provide an adequate remedy at law?

4. When property is taken by the IRS, sold and then proceeds of that sale conveyed into the Treasury, is that property in question deemed to be within the lawful custody of the court and subject to the protections of U.S.C. 28. 2463 ?

5. Petitioner alleged his "State" common law remedy in his pleadings, is that "State" common law remedy the prevailing rule of decision in federal court within this State?

6. Does U.S.C. 28 2463, preclude an innocent third party's remedy after that said property is no longer within the lawful custody of the court?

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1. The caption in the style of this writ contains the names of all the parties to this proceeding, such parties being Richard Gabel Petitioner, v. Kerry Medeiros, Commissioner of Internal Revenue Service Respondent.

IN THE

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October, Term 1996

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Petitioner

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Kerry Medeiros, Commissioner of
Internal Revenue Service

Respondent

PETITION FOR A WRIT OF CERTIORARI & MANDATE FOR THE RETURN OF PROPERTY TAKEN WITHOUT NOTICE

Petitioner, Richard Gabel, hereinafter "petitioner," requests that a Writ of Certiorari--Mandate issue to review the United States Court of Appeal for the Ninth Circuit, denial of a return of petitioners property seized under guise of a third party takings without Notice or opportunity.

Internal Revenue Service applied for a Writ to Enter (warrant) in November 1994. On or about December 9,1994 Kerry Medeiros commissioner of Internal revenue service and other unknown IRS, officers entered my warehouse made a

general searched and seized my property under guise of a third party seizure, to sell for "tax purposes" of another.

During the search and entry on the premises, IRS, agents of the United States seized mail and other correspondence such as files of petitioner. The seized constitutes an impermissible general search with indiscriminate fishing and the seizure of petitioner's mail, and private papers by IRS, and of other things at the premises. This search was both unlawful and unwarranted and no more than a fishing expedition to obtain information without Notice.

The facts hereby presented in this petition and Brief in support, will show that the search and seizure of petitioner's property, under guise of a third party seizure of petitioner's papers and effects reached a level of an impermissible general search and requires extraordinary remedy. U.S. v. Mittleman, 999 F2d 440, 444 (9th Cir 1993.) U.S. V. Crozier, 777 F. 2d 1376, 1381 (9th Cir 1985) In re Gerwig 461 F. Supp. 449 C.D. (Cal. 1978.)

The real question presented for this Honorable Court is whether the mighty protections of the 4th amendment are dead

and gone, blown away with the dust of change.

Deeply rooted in our jurisprudence is the need to stop governmental interference and intrusions without probable cause. These issues are not new to this court in fact the "general searches" authorized by the king and his men was one of the very reason for the forth amendment after the revolution.

Petitioner alleges the United States Constitution is in place and in full force to stop governmental interference without probable cause supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.. If the courts refuse to allow the people of this United States to challenge government agents and their actions then all hope in justice is lost.

The people of this United States must be free to exercise their sovereignty to enforce the laws of this land that we have depended on for so long. If the people of this United States are denied the right to redress of grievance through the court of law, to be heard fairly and equally, what hope do the people have in "JUSTICE AND LIBERTY FOR ALL."

Petitioner now presents these question of law to this Honorable Court. Petitioner has raised these questions for

review in the United States District Court, and United States Court of Appeal for the Ninth Circuit, their final opinion dated October 9th, 1996, does not provide a remedy for the taking of petitioner property to pay the debt of another.

Petitioner alleges that these courts findings are in conflict with the very maxims of law that our jurisprudence is founded on California Civil Code § 3523, "Every wrong must have a remedy." The founders of our liberties understood the very simple principal that law without a remedy was marshal law and could not be tolerable in free world, especially in America were we pledge daily to our flag with "LIBERTY AND JUSTICE FOR ALL."

Petitioner argues that the questions presented are clearly judicial in nature and plainly fall within the confines of the jurisdiction. This Honorable Court is the protector of the American peoples liberties and their property from takings by governmental agents without equal protection of the court of this United States. Petitioner now petition this Honorable Court for a Writ of Certiorari to stop government agents from lying, just to take petitioner's and others property with complete disregard of their rights and without Due--process.

Jurisdiction to hear this writ is supported by The United States Constitution, Article. III Section 1,2, Bill of Rights, California Constitution of 1849, Article VI, Section 10, and as to Article I, Declaration of rights and California Civil Code 3379, and 3380". This case was also filed under 42, 1983 a

Common Law Tort, civil rights action as stated on the cover sheet of the complaint. Petitioner's now petition this Honorable Court pursuant United States Supreme Court Rule 13.

Kerry Madeiros was notified after the seizure that some of the property taken was the personal possessions of the petitioner she responded on February 17 1995, and stated:

" The Internal Revenue Service has received your claim to ownership of those asset located at 1534 West Winton Ave., Hayward, Ca. The assets are scheduled to be sold today. The sale will go ahead as scheduled. If it later established that you own the assets proceeds from their sale will be credited to your delinquent tax liabilities."

The unfair takings of property under guise of a third party seizure, to pay anothers debt without an adequate remedy at law is nothing short of robbery. Petitioner urges this Honorable Court to exercise its independent judgement to stop the taking of innocent third parties property and to enforce the protection of the United States Constitution to all the people of this great nation.

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Amendment IV seizure, searches and warrants

[Section 1.] The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV Citizenship, Representation, and

payment of public debt. Citizenship, Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA CONSTITUTION

Art. I sec. 13. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

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OPINION BELOW

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED

OCT - 9 1996

CATHY A. CATTERSON, CLERK

U.S. COURT OF APPEALS

Richard Gabel, Plaintiff-Appellant, V. KERRY MEDERIOS; COMMISSIONER OF INTERNAL REVENUE SERVICE) Defendants-Appellees.)	No. 96-15086 D.C. No. CV-95-00510-SI MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding

Submitted October 7, 1996**

Before : BEEZER, KOZINSKI, and KLEINFELD, Circuit Judges.

Richard Gabel appeals pro se the district court's dismissal of his action seeking a writ of replevin for the return of property seized by Internal revenue Service Agent Kerry L. Mederios to satisfy the tax liability of Gabel's brother. We have jurisdiction under 28 U.S.C. § 1291. We review de novo, Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. Denied, 496 U.S. 937 (1990), and we affirm for the reasons stated by the district court in its final order filed January 9, 1996.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, appellant's request for oral argument is denied.

We have considered Gabel's remaining contentions and we conclude that they lack merit.

AFFIRMED

FILED
JAN - 9 1996
RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Richard L. Gabel, Plaintiff, v. Kerry Medeiros, Unknown Revenue Officers, Commissioner of Internal Revenue Service, and Does 1 through 50, Defendants.	)	No. C-95-510 SI **ORDER OF DISMISSAL**

ENTERED IN CIVIL DOCKET JAN. 09, 1996

Plaintiff Richard L. Gabel filed a Writ of Replevin, seeking the return of certain property seized by defendant Medeiros in his capacity as an Internal Revenue agent. The property was seized to satisfy delinquent taxes.

Defendant filed a Motion for Summary Judgement, set for hearing on January 19, 1996. The matter has been fully briefed and, in accordance with local Rule 7-1(b), the court finds it is suitable for determination without oral argument. Accordingly,

the January 19, 1996 hearing is VACATED.

Defendant's motion seeks judgement based on Plaintiff's failure to state a claim, since property seized pursuant to revenue laws is not repleviable. 28 U.S.C. § 2463 states :

> All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders of the courts of the United States having jurisdiction thereof.

Plaintiff steadfastly maintains that the only remedy he seeks is replevin. As such, defendant's position is correct. Replevin is explicitly barred by § 2463 as a remedy where property is seized under federal laws.

IT IS SO ORDERED.

Dated : January 8, 1996.

SUSAN ILLSTON
United States District Judge

---

1 At a status conference held on September 8, 1995, defendant noted that 26 U.S.C. § 7426 provides a remedy for the return of improperly seized property and that replevin was not available as a remedy to plaintiff. Plaintiff was given the opportunity to consider whether he wished to amend his complaint to allege this or any other legal theory. Plaintiff chose to maintain his action for replevin only. See Pl.'s Response to Status Conference Order, filed September 25, 1995.

Accordingly, IT IS HEREBY ORDERED that the complaint is DISMISSED WITH PREJUDICE. The clerk of the court shall close the file.

JURISDICTION

Jurisdiction of this Honorable Court is invoked to hear petitioner's Petition For Writ of Certiorari -Mandate for the return of his property taken without Due--Process. Petitioner's now petition this Honorable Court pursuant United States Supreme Court Rule 13, to enforce the Constitutional protection of petitioner's property from takings by governmental agencies without Due--Process of law.

Jurisdiction to hear this writ is the California Civil Code 3379, and 3380" and The United States Constitution, Article. III Section 1,2, Bill of Rights, California Constitution of 1849, Article VI, Section 10, and as to Article I, Declaration of rights. This case was also filed under 42, 1983 a Common Law Tort, civil rights action as stated on the cover sheet of the complaint.

The validity of this judgment of the United States District Court, United States Court of Appeal for the Ninth Circuit, is drawn into question on the grounds, that certain California State Statutes apply in Federal Court Erie, 304 U.S. at 78-79 and should have been the prevailing rule of decision in this case.

Whatever its fascination may be as a triumph of legal or a constitutional landmark, the central command of Erie is basic. In diversity cases, federal courts may apply the law that would be applied by the courts of the state in which they sit. They are

not free to decide for themselves the "right" rule of consideration, the duty that a railroad owes to a trespasser, or the enforceability of exclusive contracts. Rather than create "general common law," their job is to apply state common law. In those broad areas where the law is largely judge-made, such as contracts, torts, probate, and property issues, state law reigns supreme because "there can be no other law." Hanna v. Plumer, 380 U.S. 460, 472 (1965).

In the District Court, petitioner alleged his "State Common Law rights as the rule of decision. The District ignored petitioner pleading, abused her discretion when she ruled beyond the boundaries of State Law, completely supporting her ruling with Federal law with completely disregard to the Erie, Railroad 304 U.S. 78, case and the president that it set.

Petitioner also believes these cases and Fourth, Fifth and Fourteenth Amendments of the Constitution for the United States of America and The State of California, and the Bill of Rights, will hold the United States Court of Appeal for the Ninth Circuit judgment in abatement

Petitioner hereby petitions this Honorable Court for review of the decision of the United States District Court and the decision of the United States Court of Appeal for the Ninth Circuit affirming the judgment of the District Court.

STATEMENT OF THE CASE

On or about December 9, 1995 petitioner's property was seized without warrant, or notice under guise of a third party seizure.

Petitioner made a demand to Kerry Madeiros for the return of his property after the seizure that some of the property taken was the personal possessions of the petitioner she responded on February 17 1995, and stated:

" The Internal Revenue Service has received your claim to ownership of those asset located at 1534 West Winton Ave., Hayward, Ca. The assets are scheduled to be sold today. The sale will go ahead as scheduled. If it later established that you own the assets proceeds from their sale will be credited to your delinquent tax liabilities."

Respondents continued to ignore petitioner and eventually sold the property to satisfy the debt of another. Respondents alleged "that property was then sold and/or returned. The IRS. Does not have it." Petitioner filed a complaint under 42,1983 and under California Common Law the prevailing rule of decision, In the nature of replevin. Respondents, have made no attempt to return the property to it's rightful owner a third party to this action who's property was taken without notice.

In United States District Court respondents allege as a defense that petitioner should use the statutory remedy provided in **U.S.C. 26, 7426.** During a Status conference held on 9/8/95

the respondents offered petitioner only $2100.0 for $108,940.00 of property. The respondents have demonstrated fully why petitioner has refused this offer. On 9/25/95 petitioner presented evidence to the court that property taken was in fact his by affidavit's and the reason he could not except the offer of $2100.0. Petitioner argued the controlling statues were California State Statutes, he was ignored. Petitioner alleged that under the current conditions 26 USC 7426, it was an inadequate remedy and dose not provide for actual value of property taken to an innocent third party.

Petitioner made a timely request for discovery to assist in his study in choosing a remedy for the return of his property. Petitioner needed discovery to fully chose his remedy, and to understand the nature of attack against his property. Respondents have refused to give petitioner a pre or post deprivation hearing to settled this matter in regards to the taking of Plaintiffs' property. The respondents stated "All the IRS has is they eventually ended up selling a portion of the assets for $2100, which was then credited to James Gabel's, tax liabilities" (petitioner's brother). To date the defendants have willfully ignored and refused to produce discovery and in violation of F.R.C.P. 37 the Law.

Respondents, Kerry Medeiros, Unknown Revenue Officers, Commissioner of Internal Revenue Service, and Does 1 through 50, moved the District Court for an order of Summary Judgment, by Notice of Motion and Motion for Summary

Judgment, set for hearing on January 19, 1996. The Plaintiff moved the District Court for a Cross--Motion for Summary Judgment in plaintiff's favor, for the return of the property **seized without warrant from Richard L. Gabel/Appellant, here**, and sold to **satisfy the debt of another (James P. Gabel)**.

On December 28, the petitioner filed "Points and Authorities in Support and Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgement" explaining the necessity of affidavits and that respondents have not filed affidavits to support there contentions or oppositions. Petitioner presented argument and authorities to support his contention that 26, 7426 dose not express it's self as a exclusive remedy nor is their clear congressional language to support that the common-law remedy is displaced by the federal enactment of 28, 2463.

The respondents did not offered congressional language or argument to clarify the legislative intent nor have they presented any affidavits with supporting points or authorities that 26, 7426 is exclusive and not cumulative.

On Jan. 9, 1996, the Honorable Judge Susan Illston granted an order of dismissal in favor of the respondents completely ignoring the plaintiff's cross-motion for summary judgement.

Petitioner's claim that California State Statutes applied in the nature of replevin was dismissed by the Court, without taking into consideration the plaintiffs Cross-motion, reply or opposition, to defendants motion. And thereby, in affect,

denying the plaintiff his right to be heard on the merits F.R.C.P. 56.

On Jan. 9, 1996, the Honorable Judge Susan Illston granted an order of dismissal in favor of respondents.

Petitioner appealed to the 9th Circuit Court of Appeals to overturn the district court's order. The 9th Circuit denied petitioner's appeal and affirmed the district court order. This petition follows.

REASONS FOR GRANTING THIS WRIT

Review by this Court is necessary to promote uniformity, on the grounds that the decision of United States District Court and The United States Court of Appeal is not in line with Constitutional Authorities and prevailing case law, cited herein.

These decision will deprive the petitioner of Constitutional protections designed to protect the People's Life, Liberty, and Property of this United States. The Courts decision of United States District Court and the United States Court of Appeals gives governmental (IRS agents) the right to steal property from any one they so choose.

One of the important but less noticed aspects of the Federal Tax Lien Act, was the codification of the **procedural rights of third parties whose property is seized or threatened with seizure for the tax liabilities of another.**

For generations the law had clearly delineated the procedures by which a taxpayer might litigate his rights, but the law was silent concerning the remedies of innocent third parties, whose claims where therefore often defeated or delayed by procedural technicalities -e.g., the United States had not consented to be sued, that the district director could not be sued because he was acting within the scope of his duties or had paid the proceeds into the Treasury, or that federal jurisdiction was lacking.

The new law, in which Congress has given its consent to suit against the United States in federal district courts whenever the property of one person has been levied upon or sold for the taxes of another, marks a major step forward, but in a number of respects the relief obtainable in such a suit falls short of the reform which the American Bar Association has sought.

In such an action, the court may enjoin the enforcement of the levy on, for example, a bank account or may prohibit the sale of the property levied upon, provided the third party shows that he has rights superior to the tax lien and that these rights would be irreparably injured. Injunctive relief cannot be obtained in advance of levy, however, even though the mere assertion of a tax lien or the threat of a levy may be injurious to the third party. If seizure has occurred, the court may order the return of the money or of the specific property levied upon. **If the property has already been sold, however, the third party may recover no more than the amount realized by the United States from the sale. Thus, the innocent third party**

is not only denied recovery for the damages from being unlawfully deprived of the use of the property, but he cannot even be made whole for the actual value of the property taken. The law makes no provision for relief if the third party's property is lost, injured, or destroyed while in the custody of the tax collector. Nor does the Act provide for recovery in cases where third party's money or property has been delivered to the tax collector without formal levy by a person having no right to do so.

Such damage may not be recovered by the third party under the Tort Claims Act, United States v. One 1951 Cadillac Coupe de Ville, 125 F. Supp. 661, 663. Nor may such damage be recoverable by the challenge of a "Franks" hearing under F.R. Crim. Proc. 41(e). The evidentiary hearing, and suppression of the warrant, to show the false statements on the sworn affidavits that are material to a finding of probable cause for a "Franks" and to contest the validity of the takings of his property without proper warrant procedure.

The Special Committee on Federal Liens, not wishing to bite off too much at one time, refrained from recommending to the American Bar Ass, that "general liability of the United States for damages suffered by the third party be provided, in view of " the past unwillingness of Congress to extend the Tort Claim act to torts committing in enforcing the tax laws (questionable

policy though that may be)." Instead, the committee would that matter to 'common law' liability of the officer committing the wrong" and his right to indemnity from the United States governmental agencies.

The petitioner has presented these issues to the United State District Court, The United States Court of Appeals's and the courts have chosen to ignore and refuse to give petitioner a fair hearing on the merits for these important questions of law to answered. Petitioner now presents these question of law to this Honorable Court.

This United States Supreme Courts' ruling is necessary to **secure uniformity of decision**, and to enforce petitioner rights to hold property without governmental interference. The action and performance by our governmental officials in this case are far below reasonable expectations in this case. The issue herein requiring settlement by this Court also to protect the petitioners' constitutional rights and liberties, and property from takings without Due--process of law. Petitioner seeks review of this case to stop the deterioration of constitutional protections of the 4th, and 14th, amendments, and also stop the abuse of governmental power on the people to take property at their whim's without recourse.

Further this Honorable Court should grant this writ to sustain

and promote public confidence in our judicial system. At a time in history when public confidence is at its lowest point we should set these issues presented straight in line with the cases cited herein and the Constitutional provisions, and The Bill of Rights.

Deeply rooted in our jurisprudence is the need to stop governmental interference and intrusions without probable cause. These issues are not new to this court in fact the "general searches" authorized by the king and his men was one of the very reason for the forth amendment after the revolution.

Petitioner argues that the United States Constitution is in place and in full force to stop governmental interference without probable cause. If the courts refuse to allow the people to challenge government agents and enforce the law all hope is lost. If petitioner is denied his right to the court of law to be heard fairly to resolve these issues, what hope do the people have in "JUSTICE AND LIBERTY FOR ALL."

LEGAL ARGUMENT

Under the Constitution of the State of California, and the United States, Life, Liberty, and property are protected from seizure without Due-Process of Law. Before the Court we have the questions regarding this seizure, and taking of petitioner's property and whether he has the right to bring a **Replevin action under California Statute Civil Code 3379, and 3380" and Common Law rule of decision, for the**

return of his property ?

Does 28. U.S.C. 2463 preclude petitioner a remedy as a third party to this action ?

Lastly, does U.S.C. 26 7426 provide the exclusive remedy?

Petitioner was not a party or subject to the lien, or levy, search, or seizure of the IRS. Plaintiff contends that **U.S.C. 28. 2463** fails to provide assistance in determining if the statue is the **cumulative or exclusive** remedy for a **third party takings** to obtain the return of his property taken without Due--process of law.

Petitioner believes that the unlawfully taking of his property is very similar to robing a bank under guise that it's ok because we are going to pay of our bills with this money, this is the same defense that respondents are using stating we took your property but "that property was then sold and/or returned. The IRS. Does not have it." so we can not return it.

The District Court and the Ninth Circuit Court of Appeals has exceeded jurisdiction in ruling on 28 U.S.C. 2463, and not on the State Statutes presented.

> "That section may have had relevancy while the property upon which plaintiff held a chattel mortgage was held by a district director pursuant to a tax levy. [citation.] But after the property was sold and the proceeds from the sale covered into the treasury it was no longer possible to point to any 'property taken or detained under any revenue law of the United States' which should 'be deemed to be in the custody of the law' and subject to judicial jurisdiction. Indeed, the present suit does not purport to be a proceeding in rem

or a request that the court exercise jurisdiction over property in the custody of law. It is merely an action in personam claiming that the government owes the appellant money and ought to pay Section 2463 has nrelevancence to this proceeding."

Rutledge v. Riddell 186 F. Supp 552 (1960)

Just as in the above cited case petitioners property was eventually sold without his consent to satisfy the debt of another. **(James Gabel)**.

Respondents and each of them appear to claim to be immune from the provisions of the California State Statute, Constitution and the Constitution of the United States of America, in that they believe that they can take property from one individual and apply it to the debt of another. This is no different then robbery and is absolutely beyond any power conferred on them by the people. It appears that the respondents alleged some special form of immunity to the Constitution of the United States of America. Petitioner has searched the records and are unable to find their immunity certificates from the Constitution. This action for a writ of Replevin has been filed as an issue of law for redress of the wrongs committed against me under California Common Law. Petitioner's Replevin was dismissed by the Court, without taking into consideration California State Statutes which were the very core of this argument. Certainly California State Statutes apply in Federal Court Erie, 304 U.S. at 78-79 and should have been the prevailing rule of decision in

the case. Whatever its fascination may be as a triumph of legal or a constitutional landmark, the central command of Erie is basic. In diversity cases, federal courts may apply the law that would be applied by the courts of the state in which they sit. They are not free to decide for themselves the "right" rule of consideration, the duty that a railroad owes to a trespasser, or the enforceability of exclusive contracts. Rather than create "general common law," their job is to apply state common law. In those broad areas where the law is largely judge-made, such as contracts, torts, probate, and property issues, state law reigns supreme because "there can be no other law." Hanna v. Plumer, 380 U.S. 460, 472 (1965).

The California State Statutes California Civil Code 3379, and 3380" and Common Law rule of decision petitioner based his complaint on should have been taken into consideration by the Judge in her determination, the judges ruling without allowing the plaintiff to participate was an abuse of the Honorable Susan Illston exercise of discretion.

PLAINTIFF'S RIGHT TO COMMON LAW REMEDIES IS WELL ESTABLISHED IN CALIFORNIA AS A MATTER OF LAW

"Jurisdiction to hear this writ of Replevin is California Civil

Code 3379, and 3380" and The United States Constitution, Article. III Section 1,2, Bill of Rights, California Constitution of 1849, Article VI, Section 10, and as to Article I, Declaration of rights. This case is was also filed under 42, 1983 a Common Law Tort, civil rights action as stated on the cover sheet of the complaint.

Under California Civil Code "Sec. 22.2. Common law of England; rule of decision The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.

Plaintiff, Richard L. Gabel comes to this Court for Justice and relief, (return of his property) Petitioner's right to replevin is well established to enforce the protections of the Constitution against the takings of property without due-process of law.

"Under California law, where right is established at common law or by statute, before a new statutory remedy is created, statutory remedy will generally be considered merely cumulative, and older remedy may be pursued at plaintiff's election; however, where a right not existing at common law is created by statute, and statutory remedy for its violation is provided, statutory remedy is exclusive and no other remedy

may be pursued." Mahoney v. Crocker Nat. Bank, 571 F.Supp. 287 D.C.Cal. 1983

Plaintiff claims all **California State Common Law Rights California Civil Code 3379, and 3380"** and all times plaintiff has demanded his common law right to replevin as he is not the taxpayer involved in this action.

VAGUE AND AMBIGUOUS STATUTES MAY NOT BE ENFORCED IN A VAGUE MANNER

The statutory prevision of **U.S.C. 26, 7426** is not clear if the statutory remedy is cumulative or exclusive, to wit the **petitioner has chosen to be heard under California Common Law (Cal. Civil Code Pro. 22.2) and California Civil Code 3379, and 3380 the District Court and The Ninth Circuit Court of Appeals has ignored them.**

Rule of lenity can apply in civil statutes which have criminal applications, as well as in purely penal statutes. California Cosmetology Coalition v. Riley, 871 F.Supp. 1263 C.D.Cal. 1994

Plaintiff contends that 28 U.S.C. 2463, fails to provide assistance in determining if the statue is the **cumulative or**

exclusive remedy for a **(non-taxpayer third party)** to obtain the return of his property taken without a hearing or notice, Due--process of law.

"Where the common law gives a remedy, and another is provided by statute the latter is merely cumulative, unless expressly or by implication declared exclusive by the statute. Ward v. Severance (1857) 7 C. 126: people v. Craycroft (1852) 2 C. 243. Am Dec. 331

The statue of **U.S.C. 26 7426** is ambiguous in nature and under the present standards the statute 26 USC 7426 fails to meet legislative goal set by the legislative intent for a remedy of wrongful levy. (Quoting from the Congressional record September 12, 1966)

> "The unfairness of the current rules can be seen from examples of a typical commercial transaction. Under present law, an individual answering a newspaper ad for the sale of an inexpensive second hand television will purchase the television subject to any Federal tax lien against the seller, if recorded, even though he pays a full and fair price for the television. Under present law, an individual going into a sporting store and purchasing a bicycle for his son's birthday, will take the bike subject to the Government's recorded tax lien against the proprietor, even though he has paid full value for the bike".

"Absent clear congressional statement, preexisting statutory or

common-law rights or defenses are not displaced by federal enactment". F.D.I.C. v. McSweeney, 976 F.2d 532, certiorari denied 113 S.Ct. 2440, 124 L.Ed.2d 658 C.A.9 (Cal.) 1992

It appears that the statue is ambiguous in nature and the plaintiff desires this Court ruling on these issues. The remedy of **U.S.C. 26 7426** offered by the defendants is insufficient and will not provide an adequate remedy at law should plaintiff be deprived of the **right of replevin** and would not allow for the actual value, or recovery of the property seized. The plaintiff believes that the defendants IRS, acted with complete negligence and disregard to plaintiff and his property, in the taking of property that was not subject to the the lien, or levy, search, or seizure of the IRS, (as per California Civil Code, (1714).

Petitioner moved the Federal Court for a remedy under California Civil Code 3379, and 3380." and the both State and Federal Constitutions. It is more than just well settled law that the Constitution for the United States of America, absolutely protects an individuals right and property within the boundaries of the Federal and State Constitutions.

Just as in the above cited case The Constitutional issues were fragrantly ignored and prejudice the petitioner from a fair hearing on the application of California Statutes in the Federal

Courts. The takings of your petitioner's property is forbidden by both the State and Federal Constitutions. In the instant case at bar petitioner's property has been taken without a **Meaningful hearing**, and without notice or opportunity.

Meaningful hearing. "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be effected **are entitled to be heard;** and in order that they may enjoy the right they must first be notified.' Baldwin vs. Hale, 68 U.S. 223, 233; 17 L. Ed. 531, 534. See Windsor vs. McVeigh, 93 U.S. 274, 23 L. Ed. 914; Hovey vs. Elliott, 167 U. S. 409, 42 L. Ed. 215, 17 Sup. Ct.; Grannis vs. Ordean, 234 U. S. 385, 58 L. Ed. 1363, 34 Sup. Ct.779. It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted **at a meaningful time and in a meaningful manner**.' Armstrong vs. Manzo, 380 U.S. 545,552, 14 L.Ed. 2d. 62, 66, 85 Sup. Ct. 1187."

The IRS, agents appear to believe they have the authority to abolish the Constitutional protections, guaranteed by the Bill of Rights to all Americans. The Bill of Rights protections against a general search and seizure are to stop arbitrary actions by government officials who desire to punish by their rath the petitioner in this instant matter.

THE COURT HAS SPOKEN AND THE DISTRICT COURT AND THE COURT OF APPEAL HAS IGNORED THEIR DECISION STATE STATUTES APPLY IN FEDERAL COURT

THEIR JOB IS TO APPLY STATE COMMON LAW IN THOSE BROAD AREAS WHERE THE LAW IS LARGELY JUDGE-MADE SUCH AS CONTRACTS TORTS, PROBATE, AND PROPERTY ISSUES. STATE LAW REIGN SUPREME

The Erie Railroad Case :

A similar matter has come before the Supreme Court and been struck down in a landmark decision. That case parallels Gabel's case in many ways. The Court in Erie dramatically repudiated the 100-year tradition represented by Swift.

The facts of the case were simple: Tompkin lost an arm when hit by a projection from an Erie Railroad train while walking on a pathway along the tracks. His injury was quite likely the result of negligence; however, there was no evidence that the railroad's employees had acted wilfully or wantonly in creating the danger, which was the standard for recovery under Pennsylvania law. The federal district court, relying on Swift, concluded that it was not bound by the Pennsylvania decisions and instead followed federal decisions, which held that railroads owed a duty of due care to users of lateral pathways along the track. Tompkins recovered in federal district court, though he would have lost if the case had been brought in state court.

Interestingly, no party argued that Swift should be overruled: The defendant in Erie argued instead that the federal

court should have followed the Pennsylvania rule because it was a matter of "local usage" rather than general common law. I. Wonder, What Happened in Erie, 56 Tex. L. Rev. 1011, 1025-1026 (1978). The Erie court, however, dramatically rephrased the issue: "The question for decision is whether the oft-challenged doctrine of Swift v. Tyson shall now be disapproved." 304 U.S. at 69. To its own question, the court answered "yes" for a number of reasons.

First, Swift had failed to achieve one of the main goals of its supporters. It was hoped that the gradual accumulation of "general common law" decision by eminent federal judges would induce state judges to recognize the "rightness" of those decisions and fall into line, leading to broad uniformity in the common law throughout the nation. But state judges had the temerity to believe that they too could examine the "evidence" and "discover" true principles for themselves. Rather than docilely following federal cases, the state judges persisted in taking their own views. The result was a multiplicity of rules on recurrent issues, not only from different state courts, but also from federal and state courts within a single state.

Second, Justice Brandeis concluded, the federal practice of making common law had led to grave discrimination in the administration of justice. As Black & White Taxicab illustrates, it allowed an out-of-state plaintiff to choose a different rule of

substantive law because he could choose federal court. While a local company would have to sue in a Kentucky state court, which would refuse to enforce exclusive contracts, a diverse plaintiff could go to federal court and get a more favorable outcome. Ironically, while diversity was created to prevent prejudice against out-of-staters -- to assure a "level playing field" as they said in the 1980s -- Swift had introduced discrimination in favor of the out-of-stater.

Third, and most fundamentally, Justice Brandeis declared the Swift doctrine unconstitutional, since it authorized federal judges to "make" law in areas in which the federal government has no delegated powers. Erie emphatically adopts Holmes"s view that, in choosing its rules of decision, the federal court must look to the body with the authority to make those rules. When it comes to common law matters not within the delegated powers, that body is the state, whether it speaks by statute or judicial decision. Thus, ignoring state common law rules invades rights reserved to the state under court federal system of divided powers:

> notwithstanding the great names which may be cited in favor of the (Swift) doctrine. . . . there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states, -- independence in their legislative and independence judicial departments. Supervision over either the legislative or the judicial action of the states is in no

case permissible except as to the United States. Erie, 304 U.S. at 78-79, quoting from Baltimore & Ohio R. Co. V. Baugh, 149 U.S. 368, 401 (1893) (field, J., dissenting).

The RDA act requires the federal courts to apply "the laws of the several States," unless the federal constitution, treaties, or statutes require otherwise. In the Erie Railroad case, Justice Brandeis concluded that it would be unconstitutional to interpret it any other way.

Whatever its fascination may be as a triumph of legal or a constitutional landmark, the central command of Erie is basic. In diversity cases, federal courts may apply the law that would be applied by the courts of the state in which they sit. They are not free to decide for themselves the "right" rule of consideration, the duty that a railroad owes to a trespasser, or the enforceability of exclusive contracts. Rather than create "general common law," their job is to apply state common law. In those broad areas where the law is largely judge-made, such as contracts, torts, probate, and property issues, state law reigns supreme because "there can be no other law." Hanna v. Plumer, 380 U.S. 460, 472 (1965).

In 97 percent of the cases, this is easy. Lawyers and federal courts apply Erie every day without the slightest difficulty because all parties recognize that state law provides the governing rules of decision and there is little question as to what the state law is. There's been a lot of fuss about some

fringe cases -- we'll fuss over them ourselves in the next chapter -- but in the overwhelming number of diversity cases Erie functions simply and effectively to determine the applicable principles of substantive law.

CONCLUSION
THIS COURT SHOULD EXERCISE ITS INDEPENDENT JUDGMENT

The Court of this United States have the duty of ensuring that the above described hearing was conducted in a fair and impartial manner by an unbiased Judge. Petitioner should have been afforded the opportunity to obtain a fair hearing in an impartial manner and present evidence, and with findings supported by the totality of the relevant evidence presented; in essence "**a meaningful hearing on the merits.**"

The hearing conducted in The United States District Court and The Ninth Circuit Court of Appeals was unfair It was conducted in a prejudiced hearing in an atmosphere of prejudgment and a capricious disregard for the necessity of petitioner Richard Gabel, contentions that California State Law applies in Federal Courts and is the prevailing law as stated in the Erie Railroad case. Petitioner testimony and argument was given no weight by the Courts. The record showing also fails to address the question of law, does local State law apply in

Federal Court? In the instant case the respondents can simply thumb through the codes and chose a there whim what statutes apply to deprive petitioner of his remedy at law.

It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, (IRS agency) where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this is the enforcement of the Constitution as it was written. Today the agencies involved (IRS) have such a lackadaisical attitude when it comes to the rights of the people of this nation. These agency consistently break the laws and the constitutional prevision with impunity and completely disregard to the people's rights.

The case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned or at all events ratified the whole performance. The governmental action presented in this brief reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that Erie Railroad case shall become meaningless. In effect the United States District Court and United States Court of appeals are not free to decide for

themselves the "right" rule of consideration. They have ignored their job is to apply state common law. In those broad areas where the law is largely judge-made, such as contracts, torts, probate, and **property issues, state law reigns supreme .**

In this great Country known as the United States of America, liberties of Life, Liberty and Property is held as one of the utmost secured rights. In fact, the Statute of Liberty stands as a reminder to all of the world as a reminder of the integrity of this great nation. Justices of mighty United States Supreme, we can not let this ruling stand or condone the unlawful taking of property without due--process of law.

The petitioner respectfully urges This Honorable Court to exercise it independent judgment and rule on the issues of law before them to protect uniformity, and petitioner's Rights to a fair hearing. In the instant case before the court these questions of law need to be properly addressed. This Court's ruling is necessary to **secure uniformity of decision**, and to answer **important questions of law.**

The issue herein requiring settlement by this Honorable Court not only for this petitioner but also for the general interest of the public and to stop the entanglement of governmental interference with the Peoples rights to the protection of the Federal Constitution

The United States Supreme Court, the final authority in this nation on matters of law, and the guardian of the liberties of the American People, which presently exist against the peace and

dignity of this nation.

This Court's direction and guidance is needed to resolve this 4th amendment argument.

WHEREFORE, petitioner prays for the return of property, or in the alternative, the Petitioner respectfully request This Petition for Writ of Certiorari therefore be granted.

Date: 1 Jan 1992, 1993

Respectfully Submitted,

Richard Gabel, in Propria Persona,

AFFIDAVIT OF SERVICE

S. CT. RULE 28 5 (c.)

It is HEREBY CERTIFIED that service of the foregoing: PETITION FOR WRIT OF CERTIORARI, Has this 6th day of Jan, 1997, been made upon the parties to the proceeding, by depositing three copies in the United States Mail, postage prepaid at Red Bluff, California, addressed to:

I am not a member of the Bar of this Court, nor a party to this action. I am a resident of the City of Red Bluff, California, and have served the parties as so listed above, by the above description of service by mail, on behalf of the petitioner to this action, James P. Gabel, In Propria Persona.

Dated: Jan 6, 1997

Theresa Lankersley

I, the undersigned, a Notary Public, in and for the State of California, County of Tehama, this the 6th day of January, 1997, witness this day that the one known to me to be the above signatory personally appeared before me this day and subscribed his/her signature to the foregoing.

Patricia D. Spangle

My commission expires: 7/2/99

PATRICIA D. SPANGLE
COMM. # 1063770
Notary Public — California
TEHAMA COUNTY
My Comm. Expires JUL 2, 1999